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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONER

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

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Table of Contents

Opinions below 2

Questions presented 2

Statement of the case 3

Reasons for denying the writ 7

I. Review should be denied because the lower court's rejection of the Association's remedial theory and related evidence was in accord with this Court's decisions, and represents the only fair and practical result. 7

A. The lower courts' refusal to adopt the Association's remedial theory was mandated by this Court's decisions and the practical realities of the case. 7

B. Rejection of the Association's proffered evidence properly followed the lower courts' refusal to adopt its remedial theory. 12

C. The lower courts' refusal to accept the evidence offered by the Association was not in disregard of the Equal Educational Opportunites Act of 1974. 14

II. The district court's challenged order concerning admissions to the examination schools does not warrant review. 15

Conclusion 17

Table of Authorities Cited

Cases

Bee Machine Co. v. Freeman, 131 F. 2d 190 (1st Cir. 1942), aff'd, 319 U.S. 448 (1943) 13

Brinkman v. Gilligan, 518 F. 2d 853 (6th Cir. 1975) 15

Davis v. School Commissioners of Mobile County, 402 U.S. 33 (1971) 8, 9

Green v. County School Board of New Kent County, 391 U.S. 431 (1968) 8, 15

Hodgson v. Brookhaven General Hospital, 470 F. 2d 729 (5th Cir. 1972) 13

Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973) 4, 5, 8, 9, 11, 12, 13 et seq.

Keyes v. School District No. 1, Denver, Colo., 521 F. 2d 465 (10th Cir. 1975), cert. denied, 96 S. Ct. 806 (1976) 8, 9, 11, 13

Milliken v. Bradley, 418 U.S. 717 (1974) 9, 10, 11

Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), aff'd sub nom. Morgan v. Kerrigan, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975) 3, 4, 5, 8, 9, 11, 12 et seq.

Morgan v. Kerrigan, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975) 5

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 8, 9, 10, 11, 15, 17

White v. Higgins, 116 F. 2d 312 (1st Cir. 1940) 13

Statutes

Civil Rights Act of 1964, Title IV, 42 U.S.C. § 2000c 15

Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 14, 15

§ 1701(b) 14

§ 1702(b) 14, 15

§ 1712 14

Mass. Gen. Laws c. 15, § 1G 2

1975 Mass. Acts & Resolves, c. 716 2, 13

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Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

The respondents Massachusetts Board of Education and Commissioner of Education (hereafter referred to collectively as the Board of Education) file this brief in opposition to the petition for writ of certiorari filed by the Boston Home and School Association (the Association). The Board of Education is obligated by state law to see that the Boston School Com-

mittee complies with constitutional requirements. Mass. Gen. Laws c. 15, § 1G. Although a defendant in this case, the Board was exonerated of any liability by the district court below and retained in the case to assist with remedies.

The petitioner Association is an agency of the Boston School Department; its legal fees in this case are paid by the City of Boston. 1975 Mass. Acts & Resolves, c. 716. It is the elected city-wide governing body for over 100 local home and school associations, whose membership is not restricted to or necessarily governed by parents and teachers.

Opinions Below

The opinions below are as stated by Petitioner. Petitioner did not reproduce the remedial opinion of the district court in its appendix. Reference to that remedial opinion will be cited to the appendix to the Boston School Committee's petition for certiorari, No. 75-1445, as "B.S.C.A." References to the record on the Association's appeal to the court of appeals will be cited as "H."

Questions Presented

1. Whether the United States Court of Appeals for the First Circuit erred in affirming the district court's rejection of the remedial theory, remedial plan, and related evidence advanced by the Home and School Association in the remedy phase of this case.

2. Whether the court of appeals erred in holding that the desegregation plan adopted by the district court was a proper exercise of its equitable powers.

Statement of the Case

The petitioner Association seeks review of the decision of the United States Court of Appeals for the First Circuit affirming decisions of the District Court for the District of Massachusetts that established a systemwide desegregation plan for the Boston public schools; rejected a limited plan offered by the Association; and rejected certain evidence offered by the Association.

On June 21, 1974, the district court issued its decision holding that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). There was no dispute that the school system was characterized by racial segregation. The question before the district court was "whether the defendant [School Committee members] have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston public school system, in violation of the Fourteenth Amendment." *Morgan* v. *Hennigan*, 379 F. Supp. at 425. The district court answered this question affirmatively after a careful examination of six principal areas: (1) facilities utilization and new structures; (2) districting and redistricting; (3) feeder patterns; (4) open enrollment and controlled transfers; (5) faculty and staff; and (6) vocational and examination schools. *Id.*

The School Committee had argued that school segregation in Boston was an inevitable consequence of segregated housing patterns and a growing black population. It had further argued that it simply had adhered to a valid neighborhood school policy in making student assignments to the system's schools. *Morgan* v. *Hennigan*, 379 F. Supp. at 469. Nevertheless, the district court found that the Committee had, "with awareness of the racial segregation of Boston's neighborhoods, deliberately incorporated that segregation into the school system." *Id.* at 470. The court also concluded that the neighborhood school policy was largely fictitious:

> As for the defendants' asserted neighborhood school policy, findings heretofore made prove that it was so selective as hardly to have amounted to a policy at all. Several practices of the defendants were antithetical to a neighborhood school system: extensive busing, open enrollment, multi-school districts, magnet schools, citywide schools and feeder patterns. *Id.* at 473.

It further stated that the districting for elementary schools was inconsistent with a neighborhood school policy; distance and safety became factors only when useful to maintain segregation; and "neighborhood" schools were used only where residential segregation was firmly entrenched. *Id.*

The district court considered whether there was "a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district," as was required by *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 213 (1973). It made a factual finding that no section of the city was "separate, identifiable and unrelated." *Morgan* v. *Hennigan*, 379 F. Supp. at 475-76. Further, the district court found that the defendants did not

present sufficient proof to support a finding that the segregation in any part of the system did not result from or was not maintained by purposeful action by the Committee. *Id.* at 481. Indeed, independent of the reciprocal effects of the Committee's actions, certain of their practices had a direct segregative impact on the entire school system. *Id.* at 482. Accordingly, the district court held that the entire school system of Boston was unconstitutionally segregated. *Id.* The decision of the district court was affirmed on appeal. *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

This Court delivered its *Keyes* opinion on June 21, 1973, after the main trial on liability in the district court, but before that court issued its decision on June 21, 1974. The liability trial was reopened on June 20, 1973, and in March, 1974, the Committee moved to reopen and present new evidence in light of *Keyes*. The district court held a special hearing on the effect of *Keyes* on July 13, 1973, at which time then counsel for the Committee, James St. Clair, Esq., argued that segregation in Boston, unlike Denver, was due to segregated neighborhood patterns and that the *Keyes* decision simply extended doctrine contained in prior decisions by this Court (Tr. 7/13/73, pp. 42-43).

During the remedial stage of the case the district court permitted the Association to intervene on the condition that it could not "reopen any questions or issue which has been decided previously by this court" (H. 63). The Association presented its own plan to the district court, a plan which would have continued in effect, with a slight degree of additional desegregation, the limited racial balance plan implemented under state law and adopted as an interim desegregation plan by the district court for the 1974-1975 school year. The Association's plan conceded that at least 75 schools would remain segregated (*i.e.*, less than 35 percent or more than 75

percent white), although the number was likely to be much higher (H. 77-80, 88-90, 102-08). The district court rejected the Association's plan as a matter of law (B.S.C.A. 68), a decision affirmed on appeal (A. A-22 to A-33).

In support of its plan, the Association made an offer of certain evidence purporting to show that segregation in Boston resulted primarily from housing patterns. The district court refused to admit the evidence on the grounds that the extent and cause of segregation in schools had been litigated and decided at the liability stage (H. 162). This finding was affirmed on appeal (A. A-33).

The desegregation plan ordered into effect by the district court contains eight community school districts ranging from 40 to 95 percent white (B.S.C.A. 127-57), in a system that is 51 percent white (B.S.C.A. 181). Schools within the districts may vary from such district compositions by $\pm$ 25 percent of the district compositions (B.S.C.A. 180).[1] Thus, the allowable range for individual schools in the community districts is from 30 to 100 percent white. There is a citywide magnet school system, ranging from 46 to 56 percent white (B.S.C.A. 181). The transportation in the plan is not excessive, as claimed by petitioner. The plan requires 21,000 students to be bused, as compared with 17,000 students bused under the state racial balance plan in effect in 1974-1975, and as compared with 30,000 students who were bused or used public transit prior to desegregation (B.S.C.A. 92, 185). The average distance travelled is 2.5 miles (B.S.C.A. 184); the average time involved is between 10 and 15 minutes each way (B.S.C.A. 184).

[1] For instance, in a district that is 40 percent white, individual schools may range from 30 to 50 percent white, because 25 percent of 40 = 10 percent.

Reasons for Denying the Writ

I. Review Should Be Denied Because The Lower Courts' Rejection Of The Association's Remedial Theory And Related Evidence Was In Accord With This Court's Decisions, And Represents The Only Fair And Practical Result.

A. *The Lower Courts' Refusal To Adopt The Association's Remedial Theory Was Mandated By This Court's Decisions And The Practical Realities Of The Case.*

The Association's principal argument offers once more the theory it attempted unsuccessfully to advance in the remedy proceedings before the district court.[2] This theory asserts that a district court's responsibility in the remedial phase of a desegregation case is solely to identify and remedy those portions of segregation existing in particular schools that are attributable to the official conduct of school authorities. The evidence the Association proffered under this theory would have attempted to show that much of the segregation in the Boston school system was not caused by actions of the School Committee, but rather by unrelated residential patterns. As a result, the Association contends, the district court's systemwide remedy went too far.

The court of appeals fully considered the merits of the Association's theory in its opinion (A-23 to A-33). Its rejection of

[2] The Association has included two additional arguments in its petition. One relates to the enrollment in the Boston school system's examination schools (*see* Pet. 17-18); the other, although inexplicit, appears to concern the issue of "white flight" (*see* Pet. 19-21). The issue concerning the examination schools is discussed *infra* at 15-17. The question of "white flight" is presented more clearly in the petition filed by the Mayor of Boston, No. 75-1441, and the Board of Education respectfully refers the Court to the Board's brief filed in opposition to that petition for its response to the similar argument appearing in the Association's petition.

the theory and related evidence is plainly mandated by the findings of systemwide discrimination in the prior liability proceedings in this case. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 427-29, 433, 435-37, 449-56, 469-473, 481-82 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). It is also required by the applicable decisions of this Court. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 203, 213 (1973); *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 21, 28 (1971); *Green* v. *County School Board of New Kent County*, 391 U.S. 431, 437-38 (1968). Finally, the circuit court's decision is in complete accord with the Tenth Circuit Court of Appeals' opinion in *Keyes* v. *School District No. 1, Denver, Colo.*, 521 F. 2d 465, 476 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 806 (1976), where the defendant Denver School Board raised the identical argument.

The Association's argument would require that parties and courts in desegregation cases engage in a two-step inquiry into the causes of segregation in each school building in the school system under scrutiny. The first would occur at the liability stage of the proceedings, to determine whether the school system as a whole was unconstitutionally segregated. The inquiry would then be repeated at the remedial stage, apparently to quantify the amount of unconstitutional segregation on a school-by-school basis in order to frame an appropriate remedy limited solely to the officially segregated portions of segregated school buildings. As the court of appeals recognized, this approach to the remedy phase of a desegregation case is "squarely contrary to the remedial principles" articulated by this Court (A. A-26).

The mandate of "remedy" cases such as *Swann*, *Davis*, and *Green* is unequivocal: where a school *system* has been shown

to be unconstitutionally segregated and dual in nature, the responsible school authority (or, upon its default, the district court) must fashion a remedy that will achieve a unitary school *system* with "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis*, *supra*, 402 U.S. at 37. Thus the ultimate focus of inquiry at both the liability and remedy stages is not a particular school or set of schools, but the *system* taken as a whole. The focus is identical regardless of whether the unconstitutional segregation found that the liability stage resulted from state statutes or policies (as in the South) or from actions of local school authorities (as in northern systems such as Boston). *See Keyes*, *supra*, 413 U.S. at 213, quoting from *Green*, *supra*, 391 U.S. at 438. There is not the slightest suggestion in any of this Court's decisions on desegregation remedies that, once a finding is made of systemwide *de jure* segregation, the district court or the parties may then retrace their steps to inquire into the cause of segregation in each of the system's schools. *See Keyes*, *supra*, 413 U.S. at 213 and 203; *Keyes*, *supra*, 521 F. 2d at 476.

The district court here found that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 481-82. As the court of appeals pointed out in its opinion presently under challenge, the time for specific inquiry into the causes of segregation in each of the schools in the Boston school system was then over. The district court was required to fashion a remedy that would reach every school in the system (A. A-27 to A-28).

The Association's reliance on certain isolated phrases from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Milliken* v. *Bradley*, 418 U.S. 717 (1974), to support its restricted remedial theory is wholly misplaced. When the excerpts from this Court's opinion in *Swann* quoted at page 11 of the Petition are considered in their proper con-

text, it is plain that they refer to the necessary distinction between comprehensive remedial steps directly and properly designed to eliminate a dual school system, and more questionable steps designed to reach other types of racial discrimination — for example, in housing or employment — that may constitute the underlying and indirect causes of segregation in the schools; only the latter steps are criticized by the Court. The Association nowhere suggests, however, that the district court's remedial plan attempts to accomplish or even deal with any problem other than the dismantling of Boston's unconstitutionally segregated school system.[3]

Nor does *Milliken* v. *Bradley*, *supra*, aid the Association's argument. As stated by the court of appeals (at A. A-30, n. 23), the *Milliken* decision is entirely consistent with the principles set forth in *Swann* and other remedy cases. The limitation *Milliken* places on a district court's equity powers in fashioning desegregation remedies relates solely to its authority to order a cross- or inter-district remedy upon a finding of unconstitutional segregation in a single school district. The Boston school system, of course, constitutes only one district. Because the desegregation plan below affected only the Boston school system, the *Milliken* limitation is inapplicable. *See Keyes*, *supra*, 521 F. 2d at 476-77, n. 8.

[3] The Association also relies (*see* Pet. 11-12) on language in the *Swann* opinion providing that at the remedy stage school authorities may attempt to justify the continued existence of some segregated schools in their proposed remedial plan by proving that the segregation is not the result of past or present official discrimination. 402 U.S. at 26. The court of appeals thoroughly disposed of this argument in its opinion (A. A-28, n. 21) by pointing out that the cited language in *Swann* has no application in a case such as this where the remedy proceedings are preceded by a full trial on liability:

> In *Swann*, the school authorities were afforded the opportunity to satisfy this burden [of overcoming a presumption that schools remaining segregated in a proposed desegregation plan are the result of official discrimination] at the remedy stage of the proceedings because there had been no trial on liability. Here, of course, the school authorities have had their chance.

For the reasons stated by the court of appeals, the Association's reliance on this portion of the *Swann* opinion is unjustified.

Not only is the rejection of the Association's remedial theory fully in accord with prior decisions of this Court, it also represents the only practical decision that could have been reached. Contrary to petitioner's assertions, the district court held in the liability stage of this case that the School Committee had not followed a genuine neighborhood school policy and had constructed new schools at locations designed to preserve the existing segregated patterns of residential neighborhoods. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 423, 427-29, 469-74. This Court has recognized the segregatory impact that such actions by school officials can have on residential patterns. *Keyes*, *supra*, 413 U.S. at 201-203 and 211-213; *Swann*, *supra*, 402 U.S. at 20-21. In light of the proven history and character of the segregatory actions taken by the School Committee in governing the Boston school system, the circuit court was clearly correct in concluding that the task of "delineat[ing] the effect of illegal state action on the school populations in most of the particular schools," as suggested by the Association (Pet. 8-9), would be "awesome" if not impossible (A. A-29).

Finally, troubling inequities would arise upon acceptance of the Association's remedial theory. As the court of appeals described, such a remedy would fail to vindicate the rights of individual students in the Boston public schools (A. A-29). In addition, implementation of the Association's remedy would engage the federal courts in "planning continued segregation

and then perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage" (A. A-30). The Association does not, and could not, deny that its remedy might well have the effects described by the court of appeals. In these circumstances it is clear that the court was correct in affirming the district court's refusal to consider the Association's remedial theory. The same considerations of fairness militate against further review of the lower courts' decisions by this Court.

B. *Rejection Of The Association's Proffered Evidence Properly Followed The Lower Courts' Refusal To Adopt Its Remedial Theory.*

Because the rejection by the courts below of the Association's remedial theory was correct as a matter of law, there was no error in the district court's refusal to admit the evidence offered by the Association in support of its theory. Principles of res judicata and the law of the case warranted the exclusion of the Association's evidence as an attempt to relitigate the issue of the School Committee's responsibility for the segregated character of the Boston public schools (A. 32). The evidence was also properly excluded on the grounds that it went outside the scope of the order allowing the Association to intervene, and that it was an attempt by an agent of the Committee not to be bound by findings against the Committee. Such procedural matters are not worthy of this Court's review.

Contrary to the Association's contention, the timing of this Court's *Keyes* decision is irrelevant. In its liability decision the district court found systemwide discrimination based on systemwide evidence; it relied on the *Keyes* burden-shifting presumptions only in regard to the unconstitutional segregation found in Boston's examination and vocational schools. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 481. Moreover, the Association simply presented an erroneous view of the record in this case when it suggests that *Keyes* was not available to the Committee or its counsel during those proceedings (*compare* Pet. 15-16 *with* A. A-31, A-32 and n. 26). The Association also errs in suggesting that the validity of applying the *Keyes* presumptions in the liability stage of this case would not have been a proper issue for appeal had the Committee chosen to raise it (*compare* Pet. 16, n. 10, *with* A. A-32, n. 26). On the actual record of this case, the court of appeals was clearly correct in affirming the district court's decision to refuse introduction of the proffered evidence. As the court of appeals stated, its decision was required by settled principles of res judicata or preclusion. *See, e.g., White* v. *Higgins*, 116 F. 2d 312, 317-18 (1st Cir. 1940); *Bee Machine Co.* v. *Freeman*, 131 F. 2d 190, 192-93 (1st Cir. 1942), *aff'd*, 319 U.S. 448 (1943); *Hodgson* v. *Brookhaven General Hospital*, 470 F. 2d 729, 730 (5th Cir. 1972). *See also Keyes*, *supra*, 521 F. 2d at 473 (evidence pertaining to issues of liability resolved in this Court's *Keyes* decision held inadmissible).

The proffered evidence also goes outside the scope of the Association's permitted intervention, which prohibited the Association from relitigating issues decided at the trial on liability (H. 63). The reasonableness of such a limitation is buttressed by the fact that the Association is an agency of the Boston School Department. 1975 Mass. Acts & Resolves, c. 716. Further, the evidence the Association sought to introduce is remarkably similar to evidence presented by the Committee at trial (*see* liability trial exhibit and transcript references set out in the record below at H. 1-62).

In sum, this Court should decline to review the lower courts' decision to reject the Association's evidence where the sole purpose of this introduction was to reopen issues previously put to rest after full adversary proceedings. The courts' rejection was based on established, time-honored rules of finality.

C. *The Lower Courts' Refusal To Accept The Evidence Offered By The Association Was Not In Disregard Of The Equal Educational Opportunities Act Of 1974.*

The Association's further reliance on the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 (particularly § 1712), to support the introduction of the evidence it offered is misplaced. Section 1712 provides that a court may "impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws." It contains no statutory requirement as argued by petitioner (Pet. 14) that at the remedy stage a district court is to review the scope of the "constitutional wrong" at issue or to define the "particular denial" of equal protection needing a remedy without regard to its findings at the liability stage.

The Association's argument is based on an erroneous reading of the Act. The explicit purpose of the Act is to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b). *See id.*, § 1702(b). It does not address in any manner the scope of constitutional violations that require a desegregation remedy. Rather, as the court of appeals stated, it is intended to channel and direct the remedy fashioned by the district court after the court has determined that denials of equal protection exist in a school system and has identified their parameters (A. A-17 to A-18).

When the section of the Act relied on by the Association is read in light of the Act's governing purpose, it is clear that the "particular denials of equal educational opportunity or equal protection of the laws" refer to the constitutional violations already found by the district court. In this case the district court found that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan, supra,*

379 F. Supp. at 481-82. The "particular denial" of equal protection, therefore, was systemwide and the district court was constitutionally required to effect a systemwide remedy. *Keyes, supra,* 413 U.S. at 203; *Swann, supra,* 402 U.S. at 15-16; *Green, supra,* 391 U.S. at 438. The court of appeals correctly observed that the Act explicitly disclaims any intention of diminishing or modifying a district court's authority and responsibility to meet this constitutional obligation (A. A-17). *See* 20 U.S.C. § 1702(b).

The court of appeals' application and construction of the Equal Educational Opportunities Act of 1974 in this case was mandated by the clear provisions of the statute itself and follows this Court's analysis of a similar statute earlier passed by Congress. *See Swann, supra,* 402 U.S. at 17-18 (Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c). Furthermore, the court's interpretation of the Act is in complete accord with that adopted by the Sixth Circuit Court of Appeals. *Brinkman* v. *Gilligan,* 518 F. 2d 853, 856 (6th Cir. 1975). Thus there is neither an important, unsettled question of federal law presented by the Act nor a conflict in its interpretation among the circuits that might render this aspect of the decision an appropriate subject for Supreme Court review. Accordingly, review should be denied.

II. The District Court's Challenged Order Concerning Admissions To The Examination Schools Does Not Warrant Review.

The Association also asks this Court to review the interim order of the district court which required, for the 1975-1976 school year, that at least 35 percent of the entering seventh

and ninth grade classes of Boston's three examination schools[4] be black or hispanic students. By virtue of the Memorandum and Orders Modifying Desegregation Plan issued by the district court on May 3, 1976, however, the original interim order has become moot. Review by this Court is therefore unwarranted.

The district court's May 3 orders provide that, for the 1976-1977 school year, all students entering the examination schools for the first time must score in or above the 50th percentile on either of two ranked lists of students who took the Secondary School Admission Test (SSAT).[5] Applying this admissions formula to the ranked lists, the small number of students entering the existing ninth grade class will be composed of at least 35 percent black or hispanic students; the entering seventh grade class, however, will have only 26 percent black or hispanic students. Thus the "flat 35% requirement" in the district court's order which the Association attacks (Pet. 17) will no longer be operative.[6] The Association's request for review is therefore obsolete.

Even if the district court's recent orders on the examination schools have not rendered the court's original interim order moot, they unquestionably bear out the wisdom of the court of appeals' conviction that the district court would continue to "monitor the progress of desegregation in the examination schools and [would] adjust its future orders to assure the

[4] The three schools are Boston Latin School, Boston Latin Academy and Technical High School. They represent the elite schools in the Boston system, offering students greater college and career opportunities than do the other schools. *See Morgan* v. *Hennigan, supra,* 379 F. Supp. at 466.

[5] One list ranks applicants solely by SSAT scores; the other ranks by SSAT scores combined with grade point average.

[6] In addition, it should be noted that the reliance the new orders place on SSAT scores satisfies the Association's apparent objections concerning the district court's original rejection of a remedy based on these scores (Pet. 17-18).

continued vitality of these schools as elite institutions" (A. A-44). The orders demonstrate that desegregation of the examination schools is a flexible, ongoing process which this Court should not interrupt by reviewing a remedial order that will soon be outdated. Rather, the Court should continue to rely on "the informed judgment of the district court[ ] in the first instance" to continue the same careful process of review and adjustment which has characterized its treatment of the examination schools to date. *Swann, supra,* 402 U.S. at 28.

Conclusion.

For the reasons stated above, the Boston Home and School Association's petition for a writ of certiorari should be denied.

Respectfully submitted,

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